

Hearings –A View from the Bench



- DELRS 2010
- Administrative Judge Wade Klein
- Atlanta Regional Office
- MSPB



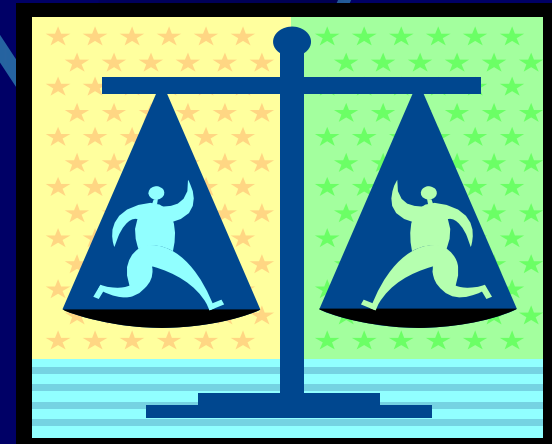
Major Types of Cases – Non OPM

- Adverse Actions
- IRA – Whistleblowing
- VEOA/USERRA
- Unacceptable Performance
- RIF
- Restoration to Duty
- Suitability

Anatomy of an Adverse Action

- ☛ Charges
 - Burden of proof
- ☛ Nexus
- ☛ Penalty
- ☛ Affirmative defenses

☛ *Burden of Proof---*



The Process

- File Development
- Jurisdictional questions
- ACK Orders & Settlement
- Discovery (failure to disclose: ***Baird v. ARMY, C.A.F.C., 2007-3046, 2/26/08***)
- Ex Parte Communications, *Nazario v. Justice, 108 MSPR 468*
- Conferences

Agency Rep's: Critical Elements and Standards



Accurate Background Information

Know the charge

Know the evidence

Motion Practice

Know the Process

Be timely

Be ready

DUE PROCESS

- *Cheney v. DOJ*, 480 F.3rd 1309
- *Lamour v. Department of Justice*, 106 MSPR 366

Administrative matters

- Travel Arrangements made
- Ensure that hearing location and time of the hearing is known to all parties requested to appear.
- Ensure that a all documents are copied and sufficient number are ready for hearing.
- Ensure that you have complete file.
- Be on time/better yet be early.

Before the Hearing

- Before the hearing, ensure that all motions have been acted upon and the any requests for documents have been addressed. Ensure that the prehearing summary is accurate.



Hearings

- Public
- Scheduling of hearing
- Delays
- Order of presentation
- Record of proceedings
- Motions/motion practice

Purpose of the hearing

- To obtain sworn testimony concerning the issues in dispute.
- To obtain evidence concerning the charges and affirmative defenses
- Opportunity to meet obligations on burden of Proof
- To determine accuracy and truth of issues presented.

Judge's Role



- Administer oaths
- Rule on offers of proof
- Hear testimony
- Rule on witnesses
- Order production of evidence
- Preside over hearing
- Make the record.

Stipulations

- Parties may stipulate to any matter of fact. The stipulations then satisfies a party's burden of proof. 5 C.F.R. 1201.63

Organizing Testimony

- Testimony and witnesses should be put together in a persuasive order that puts all the pieces of the case together. This is the job of the representatives.



Witnesses

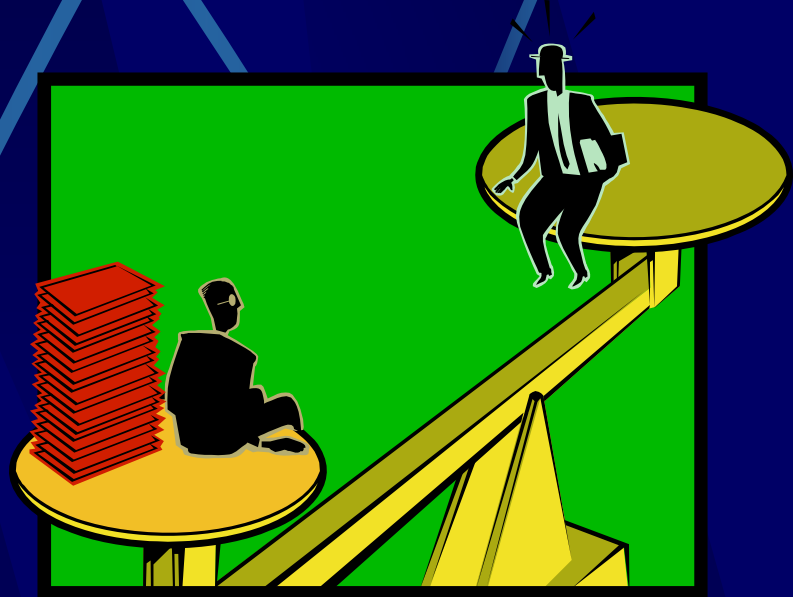
- Approval of Witnesses
- Telephonic Testimony
- Subpoenas
- Enforcing subpoenas
- Witness fees
- Testimony, See *Wallace v. Commerce*,
106 MSPR 23

Order of Hearing

- Agency goes first unless issue is jurisdiction, timeliness or the disallowance of retirement benefits.
- 5 C.F.R. 1201.57

Burden of Proof

- Obligation imposed upon a party in making his case and upon the opposing party in asserting defenses and counterclaims to persuade the trier of fact by a standard of evidence



Direct Examination

- Witness preparation is the key to a good direct examination.
- Leading questions
- Asking questions?
- Development of record.
- Burdens of Proof
- *Fitzgerald v. DHS*, 107 MSPR 666; *George v. Army*, 104 MSPR 596



Cross Examination

- A good cross can be aggressive or subtle, but it is not an interrogation.



Cross Examination

- Once you've made your point...
- but what if they don't stop?



Credibility Judge's Role

- Identify factual question in dispute.
- Summarize all the evidence that supports the charge.
- State which version is accepted.
- Explain why it is accepted.

Credibility (Hillen) Factors

- Witness' opportunity and capacity to observe
- Witness character
- Bias on part of witness
- Contradiction of version with other evidence
- Inherent improbability of witness' version

Credibility Factors

- Witness' demeanor
- Prior inconsistent statement
 - *Leatherbury v. Army*, 105 MSPR 405 (rev. and remanded by Fed. Cir.), 4/29/2008
 - *Hillen v. Dept of the Army*, 35 MSPR 453, 458 (1987)

Douglas Factors



- Be ready to prove that the factors were considered.
- Why did agency select the penalty and was there any other alternative?
- *Leach v. VA*, 107 MSPR 229
- *Tryon v. USPS*, 108 MSPR 148

Discrimination

- *Evans v. Dept. Homeland Security*, 107 MSPR 404
- *Durden v. Dept. of Homeland Security*, 108 MSPR 539
- *Brady v. Office of Sergeant at Arms*, C A D.C., No. 06-5362, March 28, 2008



Closing arguments

- When to suggest?
- *Form over Substance*
- *Judging and Fudging*
- *All facts are not equal*



What happens after a hearing?



- AJ may issue bench decision (oral decision read into record at end of hearing & later put in writing)
- If no bench decision, AJ will issue a written decision after hearing
- All decisions will contain an explanation for the decision & notice of appeal rights.

Judge Will Draft Initial Decision

- Issue within 120/90 days
- Provide right to petition to the Board
- Mixed appeal rights if discrimination is claimed
- Interim relief



Appellate Review Process

- Petition for Board Review of the initial decision—5 C.F.R. 1201.114
- Time limits and Contents of PFR
- Board criteria
- Judicial Review

MAJOR CATEGORIES OF MISTAKES AGENCYS MAKE



- Type of employee involved
- Type of action
- Charges
- Other processing issues
- *Evidence*
- *Penalty Determinations*
- *Misc.*

TYPES OF EMPLOYEES

- Does this type have appeal rights?
 - Career
 - Career-conditional
 - Probationary
 - Term
 - NAFI
 - Excepted



TYPES OF EMPLOYEES

Have you created appeal rights for this employee when they didn't have appeal rights?

- Probationary/trial employee – when does the probationary period end?

TYPES OF EMPLOYEES

- Does this type of employee have appeal rights based upon another status?
 - Preference eligible vet
 - VEOA
 - USERRA
 - Whistleblower

CHARGES

- *SELECTION OF RIGHT CHARGE*
- *WHAT ARE THE ELEMENTS OF THE CHARGE*
- *DO YOU HAVE EVIDENCE TO ESTABLISH EACH CHARGE*



CHARGES (cont.)

- *INTENT CHARGES*
- USING "AND" VS. "OR"
- CRIMINAL CHARGES
- TERMS OF ART



OTHER PROCESSING ISSUES (cont.)

- *Not identifying prior discipline in proposal letter*
- *Stone v. FDIC (not listing charges considered)*
- Off duty misconduct (nexus statement)

OTHER PROCESSING ISSUES (cont.)

Unacceptable Performance:
Chapter 75 versus Chapter 43

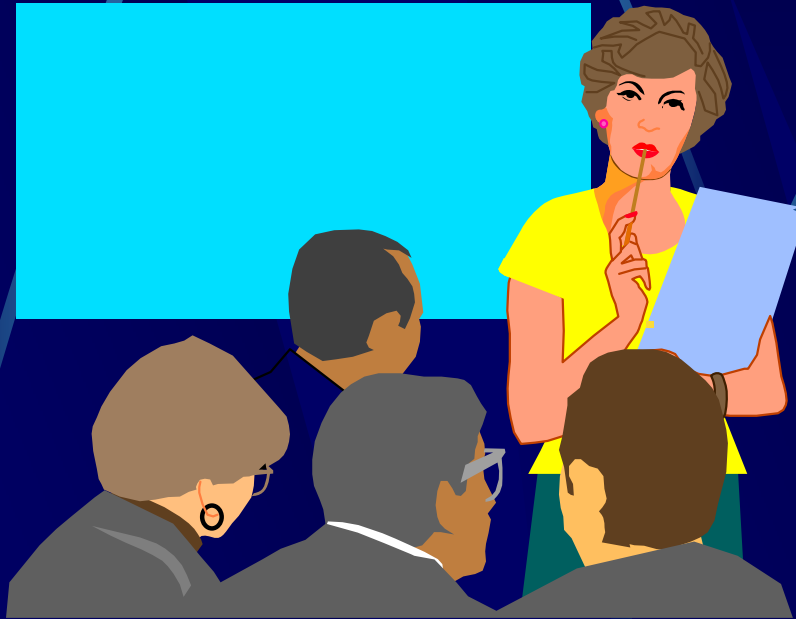
EVIDENCE

- Preservation
- Presentation
- Discovery - affirmative defenses
- *Discovery – not disclosing*



PENALTY

- Length of service – incorrect analysis
- Deciding official imposing a penalty based upon charge not proposed



MISCELLANEOUS

- File Untimely Submissions
- Ignore Board Regulations
- Ignore Burdens of Proof
- Not Talking To Witnesses
- Try the Case to the Jury



MISCELLANEOUS

- Be Silly
- Try to Fool the AJ
- Misrepresent the Law
- Fail to get to the Point
- Make Unnecessary Objections



MISCELLANEOUS

- Fail to Listen
- Forget when to Shut Up
- Argue with the AJ's Rulings
- Be Unprepared



MISCELLANEOUS

- Strike charges that can't be proven
- Be respectful to judge, opposing party, and witnesses
- Consider settlement/mediation

Drafting Charges

- Label
- Elements
- Specifications
- Burroughs v. Army,
918 F2d 170



Example



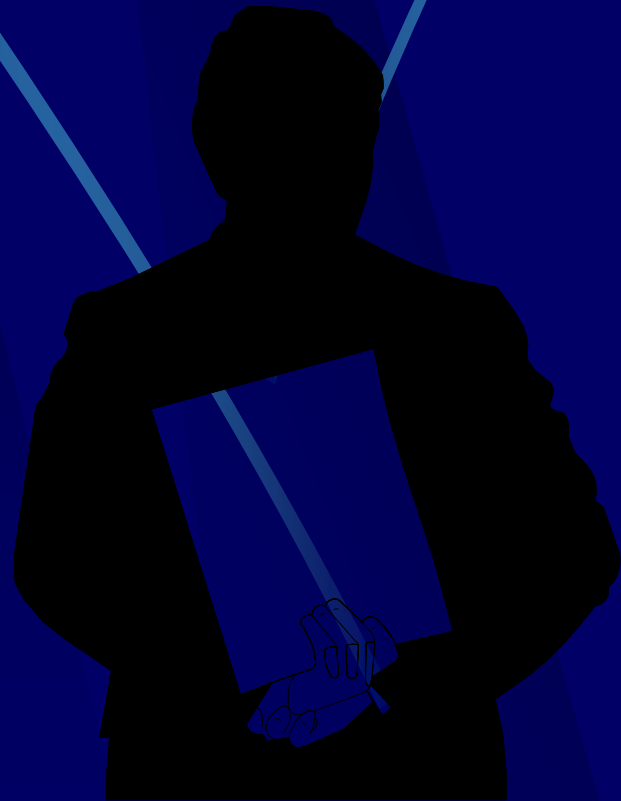
- “Directing the unauthorized use of government materials, manpower and equipment for other than official purposes”

Falsification

- *Whelan v. USPS, 103 MSPR 474*
- *George v. Army, 104 MSPR 596*
- *Fitzgerald v. Dept. Homeland Security, 07 MSPR 666*

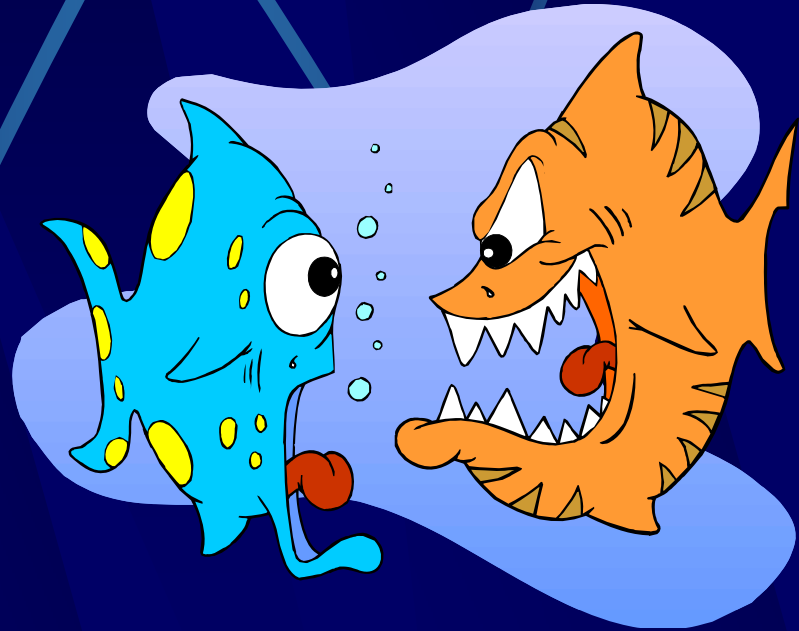
Lack of Candor ??

- *Carlton v. DOJ*, 95 MSPR 633
- *Dunn v. Air Force*
- 96 MSPR 63
- *Ludlum v. Justice*, 278 F.3d 1280
- *Christopher v. Army*, 107 MSPR 580



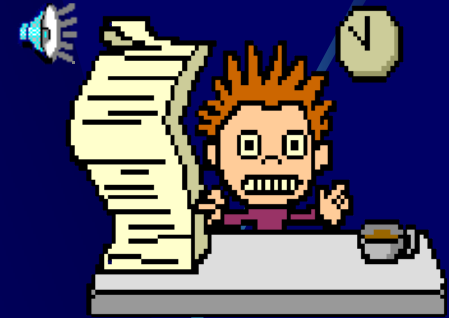
Insubordination & Threats

- *Alvarado v. Air Force*, 103 MSPR 1 Jones v.
- *Martin v. DOT*, 103 MSPR 153
- *Wiley v. Treasury*, 102 MSPR 535
- *Walker v. Army*, 102 MSPR 474



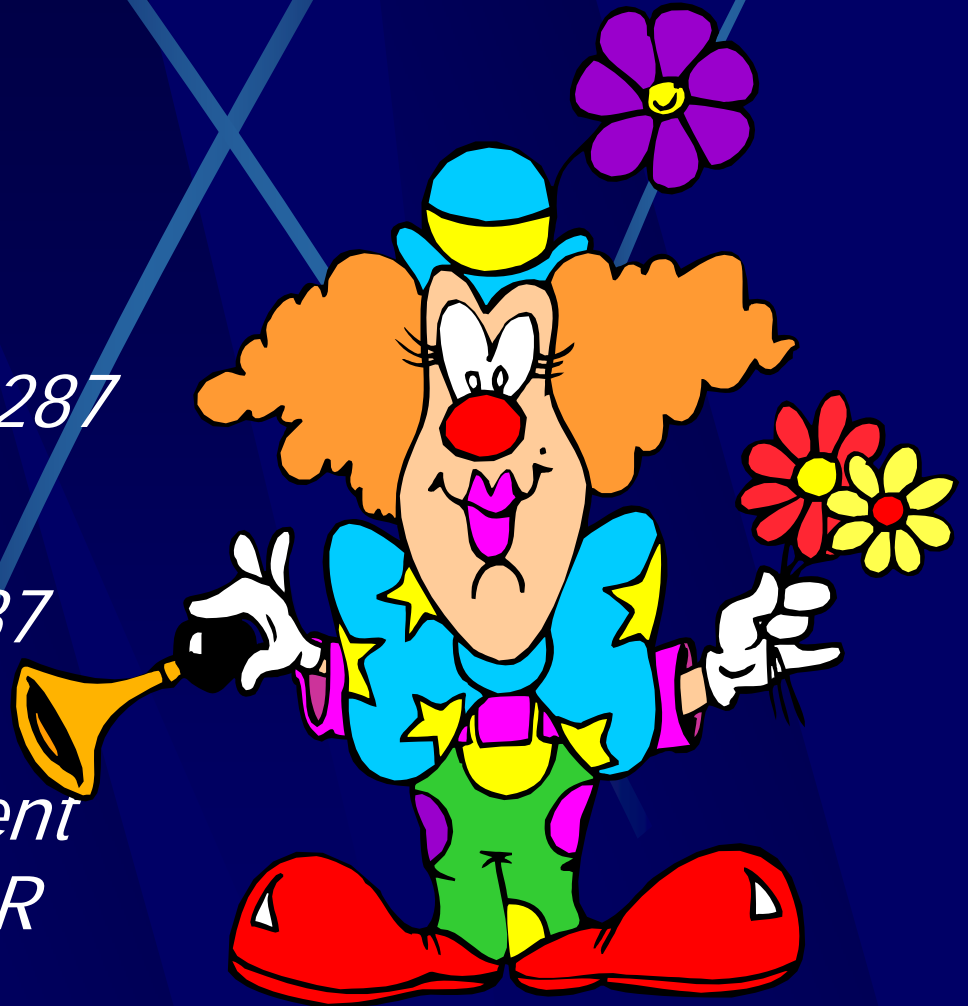
Metz Test

- Listener's reaction
- Listener's apprehension of harm
- Speaker's intent
- Conditional nature of statement
- Attendant circumstances
- Wiley v. Treasury, 102 MSPR 535
- (Zero tolerance policy)



Failure to Obey Orders

- *Grubb v. Interior*, 287
- 96 MSPR 361
- *Beiber v. Army*, 287
F. 3d 1358
- *Jones v. Department
of Justice*, 98 MSPR
86



Dishonest Conduct

- ✦ Violation of Agency Policies via use a Government Computer & credit card misuse.

Tom v. Interior, 97
MSPR 395

Quarters v. VA, 97
MSPR 511



Misuse of Government Equipment

Telephones,
Crawford-Graham,
v. VA, 99 MSPR
389; Computers
Martin v. DOT, 103
MSPR 153, *Lewis v.*
USDA, C.A.F.C.
2008-3032, Mar. 7,
2008.



Disrespectful Behavior

- *Beaudoin v. Department of Veterans Affairs*, 99 M.S.P.R. 489

Guise v. DOJ, Fed. Cir. No. 02-3339,
6/9/03

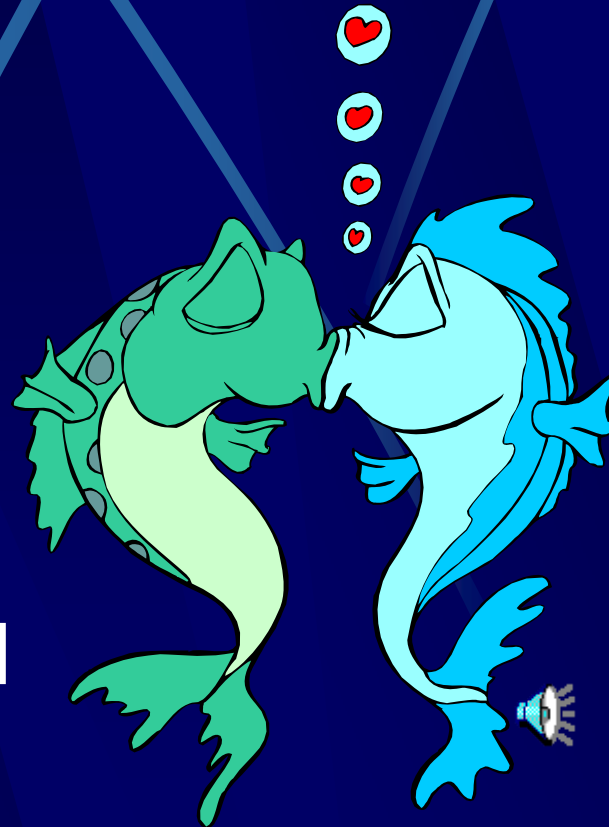
Ray v. Army, 97 MSPR 101



Sexual Harassment

✴ *Tyron v. USPS, 108 MSPR 148*

- ✴ Conduct Occurred
- ✴ Sexual in Nature
- ✴ Unwelcome
- ✴ Interfered with work performance or created an intimidating, hostile or work offensive working environment



Offensive conduct

- *Doe v. DOJ*, 103 MSPR 346
- *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004)

Conduct Unbecoming

- *Miller v. Army*, 102
MSPR 621
-
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Excessive Leave



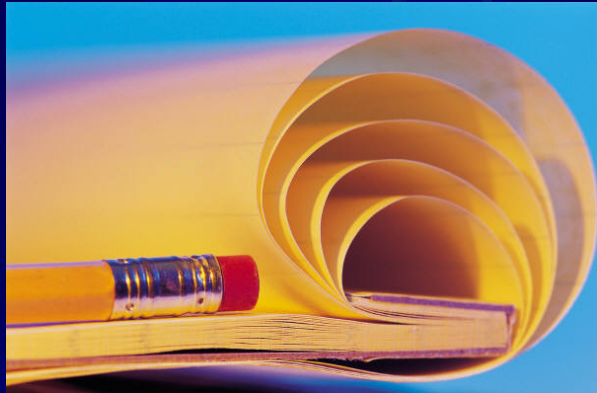
- ✱ Employee was absent for compelling reasons beyond his control.
- ✱ The absences continued beyond a reasonable time. Agency warned employee.
- ✱ The position needed to be filled by an employee available for duty.

What should the charge be????

Criminal misconduct

- Crimes v. conduct





Final Thoughts

- The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated should be considered when drafting the charge. Its not just for the deciding official.
- Make sure you consider: What, When, Who, Where and Why!

Wrap Up



- Know to the Facts
- Examine all the Facts
- Develop the Record
- Review and Reexamine
- Keep It Simple
- Don't Be Emotional
- Don't Be Insolent
- Rely on record
- Be clear
- Cite appropriate authority.
- Don't Speculate
- Be Specific
- Be accurate

That's all folks—Thanks for your attention.



- Questions?

- Closing argument.